Jurisdictional Statement

81-1041

No.

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In the Supreme Court of the United States

October Term, 1981

STAN MUSIAL & BIGGIES, INC.,
Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

APPELLANT'S JURISDICTIONAL STATEMENT

JULIUS F. PARKER, JR.
(Counsel of Record)
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
P. O. Box 669
318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Counsel for Appellant

E. L. MERRENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED ON APPEAL

WHETHER THE STATE OF FLORIDA IN ITS CORPORATE INCOME TAX CODE MAY CONSTITUTIONALLY TAX A FOREIGN CORPORATION, NOT A UNITARY BUSINESS, ON CAPITAL GAINS REALIZED BY SAID CORPORATION FROM THE SALE OF ASSETS HAVING NO NEXUS TO THE STATE OF FLORIDA AND NO CONNECTION WITH ANY ACTIVITIES OR INCOME OF THE TAXPAYER CORPORATION IN THE STATE OF FLORIDA, IN VIOLATION OF THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

PARTIES TO THIS PROCEEDING

All parties to this proceeding are listed in the caption of the Case.

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No.

In the Supreme Court of the United States

October Term, 1981

STAN MUSIAL & BIGGIES, INC.,
Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

APPELLANT'S JURISDICTIONAL STATEMENT

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS OF THE COURTS AND ADMINISTRATIVE AGENCY BELOW

1. The final Order of Department of Revenue dated December 20, 1977, is unreported, but a complete copy of that Order appears in the Appendix to this Statement at page A1.

2. The first Opinion of the District Court of Appeal of Florida, First District, is reported as *Stan Musial & Biggies v. State of Florida, Department of Revenue*, 363 So. 2d 375 (Fla. 1st DCA 1978), and a copy appears in the Appendix hereto at page A13.

3. The Opinion of the Supreme Court of Florida in this action is reported as *Department of Revenue of the State of Florida v. Stan Musial & Biggies, Inc.*, 387 So. 2d 365 (Fla. 1980), and a copy is attached hereto at page A22 of the Appendix.

4. The case referred to by the Supreme Court of Florida in its Opinion above is reported as *Roger Dean Enterprises, Inc. v. State of Florida, Department of Revenue*, 387 So. 2d 358 (Fla. 1980), and a copy thereof is attached at page A23 of the Appendix.

5. The Opinion of the District Court of Appeal, First District, State of Florida, on remand has not yet appeared in the Advance Sheets of the Southern Reporter, but a copy of it is attached at page A40 of the Appendix.

GROUNDS FOR JURISDICTION IN THE SUPREME COURT

1. The nature of this proceeding was originally an administrative hearing by the State of Florida, Department of Administration, Division of Administrative Hearings, in which the Taxpayer Corporation was Petitioner and The Department of Revenue was Respondent. The Taxpayer Corporation contested the assessment of tax under the Florida Corporation Income Tax Code applicable to the sale of stock purchased, held and sold in the State of Missouri and purchased from proceeds earned entirely within the State of Missouri.

2. The date of the Judgment sought to be reviewed is August 28, 1981, on which date the District Court of Appeal, State of Florida, First District, on remand from the Florida Supreme Court, affirmed the Final Order of Department of Revenue assessing the tax against the Taxpayer Corporation. Under those circumstances rehearing was inappropriate and was not petitioned for. The Notice of Appeal herein was filed on November 17, 1981, in the District Court of Appeal, State of Florida, First District, which Court has custody of the Record.

3. Jurisdiction of this Court is invoked pursuant to 28 USC, Section 1257(2), which provides for review by this Court:

> "By appeal, where is drawn in question the validity of a Statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

As is set forth in detail herein the Florida Corporate Income Tax Code was challenged by the Taxpayer Corporation as repugnant to the Constitution of the United States in the initial administrative hearing and in the appellate courts of the State of Florida. The decision affirming the Department of Revenue is necessarily a holding of the validity of the Florida Statute, Chapter 220, Florida Statutes, both on its face and as applied to the Taxpayer Corporation.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this case are:

1. The Fourteenth Amendment to the Constitution reading as follows:

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article 1, Section 8 of the United States Constitution providing in pertinent part as follows:

Art. 1, § 8

§ 8. Powers of Congress

Section 8. The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes; . . .

STATEMENT OF THE CASE

The facts of the case are not in dispute and are stated in detail in the Opinion of the District Court of Appeal of Florida, First District, at 363 So. 2d 375. The Taxpayer is referred to in the Opinion as SM & B and the facts are stated as follows:

"SM & B was a foreign corporation subject to the Florida Corporate Income Tax imposed by Chapter 220, Florida Statutes (1971), for the calendar year 1972.

In 1964, SM & B acquired a one-third interest in the Bal Harbour Joint venture which owned and operated the Ivanhoe Hotel and Restaurant in Bal Harbour, Florida. By 1967, SM & B's interest in the hotel and restaurant had increased to 95 percent, and by 15 December 1972, had increased to 100 percent.

On December 1972, SM & B was the sole owner of the Ivanhoe Hotel and Restaurant.

On 16 November 1972, SM & B acquired, by merger, a 100 percent interest in the Clearwater Beach Hilton, a motel and restaurant business located in Clearwater, Florida, and on 31 December 1972, continued to own 100 percent of the Clearwater Beach Hilton.

On 2 November 1972, SM & B sold certain securities which resulted in a realized gain to it for federal income tax purposes of $941,418.00. Eighty-five percent of the securities that were sold on 2 November 1972 and are the subject of the Department's assessment, were purchased before 1 August 1964 or received as stock dividends from stock purchased prior to that date. *All purchases were made with money earned from its Missouri restaurant. SM & B did not have any interest in any Florida business when this stock was purchased.* At all times the securities remained in Missouri and all dividends were received in Missouri. The securities were sold in Missouri. At the time of the sale, SM & B had no interest in the Clearwater Hilton, it merely held an interest in the partnership which owned the Ivanhoe Hotel and Restaurant.

SM & B timely filed its Florida Corporation Income Tax Return for 1972 on which it subtracted from its federal taxable income the gain from the sale of the securities and thus reported its 'Florida Net Income' and its 'Total Tax Due' as 'None'.

On or about 8 May 1974, SM & B timely filed with the Department its protest of the proposed deficiency assessment in accordance with the provisions of Section 214.71, Florida Statutes (1971).

On or about 7 June 1974, after a hearing held by the Department in accordance with the provisions of

Section 214.71, the Department issued to SM & B its Notice of Decision in which the proposed deficiency was reduced to $25,712.80.

On or about 8 October 1974, SM & B filed with the Department its written request for reconsideration of the Department's Notice of Decision. The parties stipulated that further proceedings in this cause would be processed under the Florida Administrative Procedure Act.

The Ivanhoe and Clearwater Beach Hilton Hotel and Restaurant businesses in Florida and SM & B's restaurant business in Missouri had separate, individual general managers.

One SM & B vice president was in charge of the two Florida businesses, and another vice president was in charge of the Missouri business. The actions of the two vice presidents were subject to review concerning policy matters by SM & B's board of directors, whose chairman was Stan Musial. The Florida businesses furnished information and reports concerning business activities to SM & B's main office on a semi-weekly basis. There was no central purchasing by the hotels. There was no central reservation services available between the hotels, and the hotels advertised separately and unilaterally in local publications in the cities in which they were located. No standardized product lines existed.

After a hearing, the hearing officer recommended that the deficiency assessment be vacated and that Musial be permitted to file an amended 1972 return using a method of apportionment approved by the Department which would effectuate an equitable apportionment of Musial's income in Florida. The De-

partment rejected the hearing officer's recommendations. It upheld the deficiency assessment because in its judgment the three factor formula specified in Section 214.71 fairly apportioned Musial's tax base."

363 So. 2d at 376, 377. [Emphasis supplied]

The Court went on to hold as follows:

"We agree with SM & B that it was not a unitary business in 1972. Under the facts of this case, the Missouri and Florida segments of SM & B were not integrated with, dependent upon or contributing to each other.

The Missouri segment operated a restaurant. The Florida segment operated two hotels with restaurants but the major activity was the hotel operation. Each segment was engaged in a different line of business.

Each segment did its own advertising, purchasing, bookkeeping and had its own managers. There was a lack of strong centralized management."

363 So. 2d at 378.

The Court concluded that:

"The capital gain realized by SM & B from the sale of its securities is totally unconnected with its Florida businesses. *The gains in the amount of $941,-418.00 were the result of an isolated situation in which securities were purchased, held and sold in Missouri and constitute an element of income far removed from any contacts with the State of Florida.* To totally and without modification include such gain would not fairly represent the extent of SM & B's tax base attributable to Florida. To apply to SM & B the general method of apportionment set forth in Sections 214.71 and

220.15(4) would produce an inequitable, unreasonable and unfair result."

363 So. 2d at 378. [Emphasis supplied]

The Department of Revenue thereupon petitioned for Certiorari in the Florida Supreme Court. On July 24, 1980, the Supreme Court of Florida entered its Opinion in *Roger Dean Enterprises, Inc. v. State of Florida, Department of Revenue,* 387 So. 2d 358 (Fla. 1980). The next day the Florida Supreme Court rendered its Opinion in *Department of Revenue of the State of Florida v. Stan Musial & Biggies, Inc.*, 387 So. 2d 365 (Fla. 1980), remanding the case to the First District for reconsideration in light of the Court's decision in *Roger Dean Enterprises, Inc.*, supra. Thereafter, on August 28, 1981, the First District simply affirmed the final Order of Department of Revenue dated December 22, 1977. Thereafter, the Department of Revenue issued its Notice of Tax Due to the Taxpayer Corporation, a copy of which appears at page A41 of the Appendix hereto.

The Taxpayer Corporation challenged the constitutional validity of the Florida Corporation Income Tax Code in the proceedings before the Department of Revenue and in the administrative hearing held by the State of Florida Department of Administration, Division of Administrative Hearings, as is clearly reflected in the final Order of Department of Revenue. The constitutional issues were raised again in the First District Court of Appeal and in its Brief asserted the following two points:

POINT II

EVEN IF THE TAXPAYER'S BUSINESS IS UNITARY, THE PROPOSED APPORTIONMENT FORMULA WILL NOT APPLY SINCE IT RESULTS IN AN ARBITRARY, UNREASONABLE AND UNCONSTITUTIONAL IMPOSITION OF THE TAX IN THIS CASE THEREFORE THE ADMINISTRATIVE DETERMINATION TO THE CONTRARY SHOULD BE REVERSED.

POINT III

EVEN IF TAXPAYER'S BUSINESS IS HELD TO BE UNITARY, FLORIDA LACKS SUFFICIENT NEXUS TO TAX GAIN ON STOCK AND ASSESSMENT THEREFORE CONSTITUTES UNDUE BURDEN ON INTERSTATE COMMERCE AND DENIAL OF DUE PROCESS.

The final decision of the District Court of Appeal, State of Florida, First District, is of necessity a holding that the Florida Corporate Income Tax is constitutional, both on its face and as applied to the Taxpayer Corporation.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In this case the State of Florida attempts to tax a capital gain realized by the Taxpayer Corporation on the sale of securities. It is uncontroverted in the record that eighty-five percent of the securities which were sold at a profit on November 2, 1972, were purchased prior to August 1, 1964, or received as stock dividends from stock purchased prior to that date. The stock was purchased entirely with money earned from the Taxpayer Corporation's Missouri restaurant and the Taxpayer Corporation had no interest

in any Florida business at the time the stock was purchased. It is uncontroverted that the securities were purchased and delivered in the State of Missouri and all dividends received there. The securities were sold and delivered in the State of Missouri. The profit on the sale of those securities had no relation whatsoever to any business activity of the Taxpayer Corporation in the State of Florida.

Under these circumstances the State of Florida is attempting to extend its taxing power far beyond its borders in clear violation of the Fourteenth Amendment to the United States Constitution and the Commerce Clause of the Constitution. The decision of the Florida Courts upholding the assessment of tax against the Taxpayer Corporation flies in the teeth of this Court's previous opinions in *Hans Rees' Sons, Inc. v. State of North Carolina,* 283 U.S. 123, 75 L. Ed. 879 (1934) and *Norfolk and Western Railway Company v. Missouri State Tax Commission,* 390 U.S. 317, 19 L. Ed. 2d 1201, 88 S. Ct. 995 (1968).

In *Hans Rees' Sons, Inc. v. North Carolina,* supra, the State of North Carolina had applied a statutory formula very similar to that applied by the State of Florida in this case, which the Taxpayer Corporation contended produced a percentage of income out of all appropriate proportion to the Taxpayer's business transacted in North Carolina. This Court agreed and concluded its Opinion as follows:

> "For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the

facts shown, the statutory method, as applied to the appellant's business for the years in question, operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that state. In this view, the taxes as laid were beyond the state's authority."

75 L. Ed. at 908.

In *Norfolk and Western Railway Company v. Missouri State Tax Commission*, supra, the Missouri State Tax Commission attempted to levy a tax on rolling stock of the Norfolk and Western Railway Company, valuing that rolling stock at over twice as much as the same rolling stock had been valued the previous year when it was owned by another railroad. The Courts of the State of Missouri upheld the tax and this Court on appeal reversed and vacated the final decision of the Supreme Court of Missouri. As this Court states in its Opinion:

". . . The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restrain on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders.' Nashville, C. & St. L. R. Co. v. Browning, 310 US 362, 365, 84 L Ed 1254, 1256, 60 S Ct 968 (1940). *Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State.* Fargo v. Hart, 193 US 490, 499-500, 48 L Ed 761, 765, 766, 24 S Ct 498 (1904)."

19 L. Ed. 2d at 1207. [Emphasis supplied]

The Court concluded as follows:

> "Accordingly, we conclude that, on the present record, Missouri has in this case exceeded the limits of her constitutional power to tax, as defined by the Due Process and Commerce Clauses. . . ."

19 L. Ed. 2d at 1210.

The Court has noted probable jurisdiction in an Illinois case involving substantially similar questions. The case is *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, Case No. 81-349, 50 U.S. Law Week 3375.

Appellant urges the Court to note probable jurisdiction and receive both briefs and oral arguments on the merits.

Respectfully submitted,

JULIUS F. PARKER, JR.
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
P. O. Box 669
318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Appellant
Stan Musial & Biggies, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to:

Honorable Jim Smith
Attorney General of the State of Florida
Capitol Building
Tallahassee, Florida 32302

Honorable Patricia S. Turner
Assistant Attorney General of the State of Florida
Capitol Building
Tallahassee, Florida 32302

by mail, this 25th day of November, 1981.

JULIUS F. PARKER, JR.
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
P. O. Box 669
318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Appellant
Stan Musial & Biggies, Inc.

APPENDIX

STATE OF FLORIDA
DEPARTMENT OF ADMINISTRATION
DIVISION OF ADMINISTRATIVE HEARINGS

CASE NO. 75-1112

STAN MUSIAL & BIGGIE'S, INC.,
Petitioner,

vs.

DEPARTMENT OF REVENUE,
Respondent.

FINAL ORDER OF DEPARTMENT OF REVENUE

Pursuant to notice, an administrative hearing was held before Diane D. Tremor, Hearing Officer with the Division of Administrative Hearings, on January 9, 1976, in Tampa, Florida. By Order dated March 2, 1976, Ms. Tremor granted the parties' motions to delay the rendition of her Recommended Order pending a final decision in the Florida Supreme Court case of *Department of Revenue v. Leadership Housing, Inc.*, Case No. 47,400, and the submission of the parties' proposed orders in the instant case.

APPEARANCES

For Petitioner:

Donald A. Pleasants, Esquire
Shackleford, Farrior, Stallings
& Evans
Post Office Box 3324
Tampa, Florida 33601

Louis de la Parte, Jr., Esquire
725 East Kennedy Boulevard
Tampa, Florida 33602

For Respondent:

David M. Hudson, Esquire
(Former) Assistant Attorney General

Patricia S. Turner
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

ISSUE

Broadly stated, the issue in this proceeding is the validity of the proposed deficiency in Petitioner's corporate income tax in the amount of $25,712.80 for the 1972 fiscal year. More specifically, the issue is whether Florida may lawfully tax Petitioner for the gain it realized on the sale of securities in the amount of $941,418.00. Included within this issue is the question of whether the apportionment formula set forth in Florida Statutes §214.71 is applicable to Petitioner.

FINDINGS OF FACT

Upon consideration of the pleadings, the stipulations of the parties and the record in this proceeding, the following relevant facts are found:

1. During the calendar year 1972, Petitioner was a foreign corporation subject to the Florida Corporate Income Tax imposed by Chapter 220, Florida Statutes. Petitioner also operated a business, Stan Musial & Biggie's Restaurant, in St. Louis, Missouri.

2. On January 1, 1972, Petitioner held a 95% interest in Bal Harbour Joint Venture, which owned and operated the Ivanhoe Hotel and Restaurant (Stan Musial & Biggie's)

in Bal Harbour, Florida. On December 15, 1972, Petitioner was the sole owner of the Ivanhoe Hotel and Restaurant.

3. On November 16, 1972, the Petitioner acquired by merger a 100% interest in the Clearwater Beach Hilton, a hotel and restaurant business located in Clearwater, Florida, and continued to own this interest on December 31, 1972. Petitioner operated a Stan Musial & Biggie's Restaurant in conjunction with this hotel.

4. The Clearwater and Ivanhoe hotel and restaurant businesses in Florida and the Petitioner's business in Missouri have separate, individual general managers. There is no central purchasing by the hotels. There are no central reservation services available between the hotels, and the hotels advertise separately and unilaterally in local publications in the cities in which they are located. No standardized product lines exist. A similar finding was not made by the Hearing Officer concerning the restaurant operations.

5. On November 2, 1972, Petitioner sold certain securities which resulted in a realized gain to Petitioner for federal income tax purposes of $941,418.00. Said securities were purchased, located and sold in the State of Missouri and had no relationship to Petitioner's Florida transactions.

6. Petitioner timely filed its 1972 Florida corporate income tax return on which it subtracted from its federal taxable income the gain realized from the sale of the securities. Its "Florida net income" and its "total tax due" were thus reported as "none."

7. On or about May 8, 1974, Respondent advised Petitioner of a proposed deficiency in Petitioner's 1972 tax in the amount of $29,392.00. In accordance with the provisions of Florida Statutes §214.11, Petitioner timely filed with

Respondent its protest of the proposed deficiency assessment. After a hearing, Respondent issued to Petitioner its Notice of Decision in which the proposed deficiency was reduced to $25,712.80, and the reasons therefor were set forth. Petitioner requested reconsideration by Respondent.

8. On March 11, 1972, the parties stipulated that further proceedings in this cause would be processed under the Florida Administrative Procedure Act. The petition for hearing was forwarded by Respondent to the Division of Administrative Hearings, and Diane D. Tremor was duly assigned as Hearing Officer.

9. The following operational data concerning Petitioner's restaurant and hotel/motel business, omitted from the Findings of Fact by the Hearing Officer are hereby added to the Findings of Fact as pertinent to Petitioner's businesses. The data was extracted from federal and state tax returns and from the audit report determining the proposed Florida corporate income tax deficiency and are part of the record. See Exhibit "D" attached to Petitioner's Petition and Stan Musial and Biggie's Ivanhoe Hotel Federal Partnership Return attached to Petitioner's Answers to Interrogatories to Petitioner.

STAN MUSIAL AND BIGGIE'S, INC.
CALENDAR YEAR 1972

Income Source	Florida Locations: Bal Harbour	Florida Locations: Clear-water	St. Louis Missouri
Food Sales	540,914	49,750	908,145
Beverage Sales		53,559	315,649
Total Food & Beverage	540,914	103,309	1,223,794
Room Sales	1,106,287	126,168	NONE
Other Sales	97,177	NONE	NONE
Total Sales	1,744,378	229,477	1,223,794
Add Clearwater	229,477		
Total Florida	1,973,855		1,973,855
Total Everywhere			3,197,649
Ratio of Florida to Total	.6172		
Ratio of Missouri to Total	.3827		

Restaurant and Hotel/Motel Property	Florida Locations: Bal Harbour	Florida Locations: Clear-water	St. Louis Missouri
At January 1, 1972	2,746,444	NONE	1,068,431
At December 31, 1972	2,888,374	4,306,197	1,074,137
Ratio at January 1, 1972 Florida to Total	.7199		
St. Louis to Total	.2800		
Ratio at December 31, 1972			
Florida to Total	.8700		
St. Louis to Total	.1299		

10. The following facts concerning Petitioner's Restaurant and hotel/motel businesses, omitted from the Findings of Fact by the Hearing Officer, are hereby added to the Findings of Fact as pertinent to Petitioner's business. The facts are part of the record and are contained in Petitioner's Proposed Findings of Fact and Conclusions of Law and Stan Musial and Biggie's Ivanhoe Hotel Federal Partnership Return attached to Petitioner's Answers to Interrogatories to Petitioner.

The staff and on-site supervisory personnel of the Florida operations were under the direction and control of Petitioner's Vice President, Richard Musial. The Missouri staff and on-site supervisory personnel were under the direction of Petitioner's Vice President, Jack Garagrani. Stanley Musial, President and Chairman of the Board, determined and carried out overall policy. The restaurants were advertised as being one of several Stan Musial and Biggie's Restaurants.

11. The Hearing Officer's finding that there were no central operating records is not based upon substantial, competent evidence and is hereby rejected. The record demonstrates that the Ivanhoe Hotel and/or the Clearwater Hilton Hotel furnished information or reports to the main offices of Petitioner concerning their business activities *semi-weekly* in 1972. See Petitioner's Answers to Interrogatories to Petitioner, Answer No. 16(a).

CONCLUSIONS OF LAW

As noted above, the prime issue in this case is whether the gain realized by Petitioner from the sale of securities in another state on November 2, 1972, is taxable under Florida's corporate income tax code. At the hearing and in its petition, the Petitioner has contended that the ap-

portionment formula set forth in Florida Statutes §214.71 is not applicable to it, inasmuch as the Petitioner's business is not unitary. In the alternative, Petitioner argues that even if its business were unitary, the apportionment formula should not apply, since it results in an arbitrary, unreasonable, and therefore unconstitutional imposition of taxation in this case. Petitioner has urged that a monthly averaging formula, separate accounting, or some other equitable method of computation be applied to it for the year 1972. Finally, Petitioner contended that the capital gain upon which the assessment is based represents an unconstitutional tax on an accretion to value occurring prior to the effective date of the Florida corporate income tax law.

This latter issue has recently been decided adversely to the Petitioner's position in the Florida Supreme Court case of *Department of Revenue v. Leadership Housing, Inc. and Leadership Communities, Inc.*, 343 So.2d 611 (Fla. 1977). There, the Court held that

> . . . appreciation becomes income only upon the sale, exchange, or other disposition of the capital asset together with the accretions thereto, and that such realized gain is income in the year of disposition regardless of when it accrued.

In response to Petitioner's remaining three allegations, Respondent contends that the Florida corporate income tax law provides that all items of income are to be subjected to the apportionment formulae provided by Florida Statutes §§214.71 and 220.15(4), and that Florida Law does not provide for the allocation of particular items to the various states. Respondent contends that Petitioner's restaurant and hotel businesses in Florida and Missouri are part of a unitary business and that imposition of the apportionment

formula upon Petitioner is not arbitrary, unreasonable or otherwise unconstitutional.

The Hearing Officer did not find it dispositive of the issue or relevant to determine whether Petitioner was engaged in a unitary restaurant business or a unitary restaurant and hotel/motel business, and, therefore, did not so find. Respondent nevertheless contends that the facts as set forth above establish that Petitioner is engaged in a unitary restaurant and/or a restaurant and hotel/motel business. Engaging in a unitary business, Petitioner's Florida tax base, which includes the gain on the sale of stock, is properly apportionable in accordance with the three-factor formula specified in Florida Statutes §214.71, as modified by Florida Statutes §220.15.

The Florida corporate income tax code imposes upon corporations an excise or privilege tax measured by net income. Florida Statutes §220.11(2). A taxpayer's net income is defined to be that share of its adjusted federal income which is apportioned to Florida under the provisions of Florida Statutes §220.15, less the annual exemption allowed by §220.14. Florida Statutes §220.12(1). Section 220.15 provides that adjusted federal income shall be apportioned to the state in accordance with Part IV of Florida Statutes Ch. 214, as the apportionment fraction described in §214.71 is modified in §220.15(4).

Part IV of Ch. 214 sets forth the methods of determining the extent of taxpayer's tax base attributable to Florida. Florida Statutes §214.71, as modified by §220.15, sets forth the general method of apportionment except as otherwise provided in §§214.72 and 214.73, and includes a three-factor formula.

The three factors are (1) a property factor, (2) a payroll factor, and (3) a sales factor. Each of these factors

is determined by dividing the property (payroll or sales) of the taxpayer owned, located or used *in Florida* by the taxpayer's property (payroll or sales) owned, located or used everywhere. Property and payroll factors are then multiplied by 25%, the sales factor is multiplied by 50%, and the sum of the three is the "apportionment factor." The apportionment factor is, in turn, multiplied by the taxpayer's adjusted federal income to yield the taxpayer's tax base, or "net income for the taxable year." The amount of tax liability is 5% of the "net income for the taxable year" (less the $5,000 exemption provided by Florida Statutes §220.14).

Section 214.72, Florida Statutes, provides for the method of apportionment for certain special industries. Section 214.73, Florida Statutes, provides for other methods of apportionment as follows:

> If the apportionment methods of §214.71 and 214.72 do not fairly represent the extent of a taxpayer's tax base attributable to this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's base, if reasonable:
>
> (1) Separate accounting;
>
> (2) The exclusion of any one or more factors;
>
> (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's tax base attributable to this state; or
>
> (4) The employment of any other method which will produce an equitable apportionment.

In implementation of §214.73, supra, Respondent promulgated, *inter alia*, Department of Revenue Rule 12C-1.15 (6), Florida Administrative Code, which provides in pertinent part:

Section 214.73 permits a departure from the apportionment methods of Sections 214.71 and 214.72, only in limited and specific cases. Section 214.73 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment provisions contained in Sections 214.71 and 214.72.

Florida's corporate income tax code does not provide for the specific allocation of income items such as dividends, interest, royalties and gains on the sale of securities and other capital assets to the domiciliary state, the state of situs, or the place of sale. The Legislature of the State of Florida deliberately elected full apportionment of all income. See *Florida State University Law Review*, "An Introduction to Florida Corporate Income Taxation," Arthur J. England, Jr., p. 17; and *Roger Dean Enterprises, Inc. v. Department of Revenue*, DOAH Case No. 76-2212, dated July 7, 1977.

Therefore, if the three-factor formula method specified in Section 214.71, Florida Statutes, fairly apportions Petitioner's tax base, the fact that Petitioner's tax base also includes income from a gain on the sale of stock or securities does not preclude use of the three-factor formula to apportion the gain.

Universally accepted corporate practice is to retain and to set aside from corporate earnings and profits a portion of such earnings and profits and to temporarily invest such retained earnings in the securities of other corporations. Set-aside funds or investments are available for general corporate purposes: to tide the corporation over loss years, to sustain or rescue divisions temporarily in financial trouble or to expand operations in the same or other fields. Therefore, it can only be concluded that under generally

accepted corporate practices, sales proceeds from the sale of stock would be used to expand Petitioner's restaurant and hotel/motel business to Clearwater, Florida. These circumstances are commonplace, are neither unique nor nonrecurring and do not produce incongruous results. If they were not considered commonplace, every such sale of stock or other capital asset by an out-of-state corporate taxpayer would escape Florida taxation.

Additionally, Petitioner's dollar gross from its Florida restaurant and hotel/motel business exceeded the dollar gross from its Missouri restaurant business. The dollar cost of Petitioner's Florida property investment exceeded its Missouri investment. In these significant aspects, Florida clearly appears to be the predominant contributor to Petitioner's business. Florida seeks only an apportioned share determined by a formula universally judged as reasonable.

Application of the formulae of §§214.71 and 220.15(4), Florida Statutes, yields an apportionment factor of only approximately 0.57, based upon 82% property, 57% payroll, and approximately 45% sales located in and occurring in Florida in 1972 (Petition, Exhibit "D"). By subjecting only 57% of Petitioner's total net income (with proper adjustments) to taxation, application of §§214.71 and 220.15, Florida Statutes, does not produce an incongruous result to invoke the utilization of §214.73, Florida Statutes; is not an arbitrary, unreasonable, or an undue burden on interestate commerce; and does not result in an unconstitutional imposition of taxation.

RECOMMENDATION

Based upon the findings of fact and conclusions of law recited above,

IT IS RECOMMENDED THAT:

The proposed deficiency assessment in the amount of $25,712.80 be upheld.

CERTIFICATION

I CERTIFY that the foregoing is the Final Order of the Department of Revenue adopted by the Governor and Cabinet on the 20th day of December, 1977.

/s/ Harry L. Coe, Jr.
Harry L. Coe, Jr., Executive Director
State of Florida, Department of Revenue
Room 102, Carlton Building
Tallahassee, Florida 32304

Dated this 22nd day of December, 1977.

STAN MUSICAL & BIGGIE'S, INC., Petitioner,

v.

STATE of Florida, DEPARTMENT OF REVENUE, Respondent.

No. II-391.

District Court of Appeal of Florida,

First District.

Sept. 25, 1978.

Rehearing Denied Nov. 8, 1978.

Foreign corporation sought review of final order of Department of Revenue upholding deficiency assessment of corporate income taxes alleged to be due the state from the foreign corporation for calendar year 1972. The District Court of Appeal, Mills, J., held that where foreign corporation recognized capital gains in the amount of $941,418, which were result of isolated situation in which securities were purchased, held and sold in Missouri, such gains constituted element of income far removed from any contacts with the state and thus to apply to those gains of the corporation the general statutory three-factor formula for apportioning corporation net income to the state would not fairly represent extent of corporation's tax base attributable to Florida.

Petition granted.

Reversed and remanded with instructions.

1. Taxation (Key) 1005

Where foreign corporation was divided into two segments, one in Missouri and one in Florida, each of which was engaged in different line of business, each segment did

its own advertising, purchasing, bookkeeping and had its own managers, and there was lack of strong centralized management, the Missouri and Florida segments of the corporation were not integrated with, dependent upon or contributing to each other, and thus corporation was not "unitary business" within meaning of administrative code rule governing implementation of tax statute provision governing method of apportioning corporation net income to state. West's F.S.A. §§ 214.70-214.73, 220.11(2), 220.12(1), 220.14, 220.15, 220.15(4).

See publication Words and Phrases for other judicial constructions and definitions.

2. Taxation (Key) 1005

Status of foreign corporation as nonunitary business under administrative code rule governing implementation of tax statute provision governing method of apportioning corporate net income to state did not totally preclude application of statutory three-factor formula for apportioning corporation net income to state. West's F.S.A. §§ 214.70-214.73, 220.11(2), 220.12(1), 220.14, 220.15, 220.15(4).

3. Taxation (Key) 1075

Application of statutory three-factor apportionment formula of corporate net income to state is required unless taxpayer demonstrates unique and nonrecurring situation making utilization of the formula unfair. West's F.S.A. §§ 214.71, 214.73, 220.15(4).

4. Taxation (Key) 1005

Where foreign corporation recognized capital gains in amount of $941,418, which were result of isolated situation in which securities were purchased, held and sold in Missouri, such gains constituted element of income far re-

moved from any contacts with the state of Florida, and thus to apply to those gains of the corporation the general statutory three-factor formula for apportioning corporate net income to the state would not fairly represent extent of corporation's tax base attributable to Florida. West's F.S.A. §§ 214.70-214.73, 220.11(2), 220.12(1), 220.14, 220.15, 220.15(4).

Julius F. Parker, Jr., and Susan Potter Whisenand, of Madigan, Parker, Gatlin, Swedmark & Skelding, Tallahassee, for petitioner.

Robert L. Shevin, Atty. Gen., Patricia S. Turner, Asst. Atty. Gen., John D. Moriarty, Tallahassee, for respondent.

MILLS, Judge.

Stan Musial & Biggies, Inc. (SM & B) seeks review of a final order of the Department of Revenue (Department) upholding a deficiency assessment of corporate income taxes alleged to be due the State from SM & B for the calendar year 1972.

SM & B contends that the apportionment formula set forth in Section 214.17, Florida Statutes (1971), and applied by the Department in arriving at the deficiency assessment was not applicable to it because it was not a unitary business.

SM & B was a foreign corporation subject to the Florida Corporate Income Tax imposed by Chapter 220, Florida Statutes (1971), for the calendar year 1972.

In 1964, SM & B acquired a one-third interest in the Bal Harbour Joint Venture which owned and operated the Ivanhoe Hotel and Restaurant in Bal Harbour, Florida. By 1967 SM & B's interest in the hotel and restaurant had

increased to 95 percent, and by 15 December 1972, had increased to 100 percent.

On 31 December 1972, SM & B was the sole owner of the Ivanhoe Hotel and Restaurant.

On 16 November 1972, SM & B acquired, by merger, a 100 percent interest in the Clearwater Beach Hilton, a motel and restaurant business located in Clearwater, Florida, and on 31 December 1972, continued to own 100 percent of the Clearwater Beach Hilton.

On 2 November 1972, SM & B sold certain securities which resulted in a realized gain to it for federal income tax purposes of $941,418.00. Eighty-five percent of the securities that were sold on 2 November 1972 and are the subject of the Department's assessment, were purchased before 1 August 1964 or received as stock dividents from stock purchased prior to that date. All purchases were made with money earned from its Missouri restaurant. SM & B did not have any interest in any Florida business when this stock was purchased. At all times the securities remained in Missouri and all dividends were received in Missouri. The securities were sold in Missouri. At the time of the sale, SM & B had no interest in the Clearwater Hilton, it merely held an interest in the partnership which owned the Ivanhoe Hotel and Restaurant.

SM & B timely filed its Florida Corporation Income Tax Return for 1972 on which it subtracted from its federal taxable income the gain from the sale of the securities and thus reported its "Florida Net Income" and its "Total Tax Due" as "None".

On or about 8 May 1974, the Department advised SM & B of a proposed deficiency in SM & B's 1972 Florida Corporation Income Tax in the amount of $29,392.00.

On or about 7 June 1974, SM & B timely filed with the Department its protest of the proposed deficiency assessment in accordance with the provisions of Section 214.71, Florida Statutes (1971).

On or about 13 August 1974, after a hearing held by the Department in accordance with the provisions of Section 214.71, the Department issued to SM & B its Notice of Decision in which the proposed deficiency was reduced to $25,712.80.

On or about 8 October 1974, SM & B filed with the Department its written request for reconsideration of the Department's Notice of Decision. The parties stipulated that further proceedings in this cause would be processed under the Florida Administrative Procedure Act.

The Ivanhoe and Clearwater Beach Hilton Hotel and Restaurant business in Florida and SM & B's restaurant business in Missouri had separate, individual general managers.

One SM & B vice president was in charge of the two Florida businesses, and another vice president was in charge of the Missouri business. The actions of the two vice presidents were subject to review concerning policy matters by SM & B's board of directors, whose chairman was Stan Musial. The Florida businesses furnished information and reports concerning business activities to SM & B's main office on a semi-weekly basis. There was no central purchasing by the hotels. There were no central reservation services available between the hotels, and the the hotels advertised separately and unilaterally in local publications in the cities in which they were located. No standardized product lines existed.

After a hearing, the hearing officer recommended that the deficiency assessment be vacated and that Musial be

permitted to file an amended 1972 return using a method of apportionment approved by the Department which would effectuate an equitable apportionment of Musial's income in Florida. The Department rejected the hearing officer's recommendations. It upheld the deficiency assessment because in its judgment the three factor formula specified in Section 214.71 fairly apportioned Musial's tax base.

The Florida Corporate Income Tax Code imposes upon corporations an excise or privilege tax measured by net income. Section 220.11(2). A taxpayer's net income is defined to be that share of its adjusted federal income which is apportioned to Florida under the provisions of Section 220.15, less the annual exemption allowed by Section 220.14. Section 220.12(1). Section 220.15 provides that adjusted federal income shall be apportioned to the State in accordance with Part IV of Ch. 214, as the apportionment fraction described in Section 214.71 is modified in Section 220.15(4).

Part IV of Chapter 214 sets forth the methods of determining the extent of the taxpayer's tax base attributable to Florida. Section 214.71, as modified by Section 220.15, sets forth the general method of apportionment except as otherwise provided in Sections 214.72 and 214.73, and includes a three-factor formula.

The three factors are (1) property, (2) payroll, and (3) sales. Each of these factors is determined by dividing the property (payroll or sales) of the taxpayer owned, located or used in Florida by the taxpayer's property (payroll or sales) owned, located or used elsewhere. Property and payroll factors are then multiplied by 25 percent, the sales factor is multiplied by 50 percent, and the sum of the three is the apportionment factor. The apportionment factor is, in turn, multiplied by the taxpayer's adjusted federal income to yield the taxpayer's tax base, or net in-

come for the taxable year. The amount of tax liability is 5 percent of the net income for the taxable year less the $5,000 exemption provided by Section 220.14.

Fla.Admin.Code Rule 12C-1.15(4), which implements Section 214.71, provides in pertinent part:

"(4) General Method

(a) Taxpayers who have income from sources within and without Florida are taxable upon the adjusted federal income apportioned to Florida in accordance with Part IV of Chapter 214, F.S.

Where the Florida activities are a part of a unitary business carried on within and without Florida, the portion of the taxpayer's income subject to tax in Florida will generally be determined by a three-factor formula of property, payroll and sales.

The activities of the taxpayer will generally be considered a unitary business if the segments under consideration are integrated with, dependent upon, or contribute to each other and the operations of the taxpayer as a whole, although the facts of each case will be the major determinant. A strong presumption of a unitary business is created by the presence of any of the following factors:

1. Same type of business. . . .

2. Steps in a vertical process. . .

3. Strong centralized management. . . ."

Section 214.72 provides for the method of apportionment for certain special industries. Section 214.73 provides for other methods of apportionment as follows:

"If the apportionment methods of sections 214.71 and 214.72 do not fairly represent the extent of a tax-

payer's tax base attributable to this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's tax base, if reasonable:

(1) Separate accounting;

(2) The exclusion of any one or more factors;

(3) The inclusion of one or more additional factors which will fairly represent the taxpayer's tax base attributable to this state; or

(4) The employment of any other method which will produce an equitable apportionment."

In implementation of Section 214.73 the Department promulgated Fla.Admin.Code Rule 12C-1.15(6), which provides in pertinent part:

"Section 214.73 permits a departure from the apportionment methods of Sections 214.71 and 214.72, only in limited and specific cases. Section 214.73 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) product incongruous results under the apportionment provisions contained in Sections 214.71 and 213.72."

[1] We agree with SM & B that it was not a unitary business in 1972. Under the facts of this case, the Missouri and Florida segments of SM & B were not integrated with, dependent upon or contributing to each other.

The Missouri segment operated a restaurant. The Florida segment operated two hotels with restaurants but the major activity was the hotel operation. Each segment was engaged in a different line of business.

Each segment did its own advertising, purchasing, bookkeeping and had its own managers. There was a lack of strong centralized management.

[2, 3] We do not agree with SM & B that because it was not a unitary business it was not subject to the three factor apportionment formula provided by Sections 214.71 and 220.15(4). The three factor apportionment formula is required unless the taxpayer demonstrates a unique and nonrecurring situation making utilization of the formula unfair. SM & B has proved such a unique and nonrecurring situation here.

[4] The hearing officer properly applied the applicable law to the facts of this case in her recommended order. Section 214.73 and Fla.Admin.Code Rule 12C-1.15(6) govern the disposition of this case.

The capital gain realized by SM & B from the sale of its securities is totally unconnected with its Florida businesses. The gains in the amount of $941,418.00 were the result of an isolated situation in which securities were purchased, held and sold in Missouri and constitute an element of income far removed from any contacts with the State of Florida. To totally and without modification include such gain would not fairly represent the extent of SM & B's tax base attributable to Florida. To apply to SM & B the general method of apportionment set forth in Sections 214.71 and 220.15(4) would produce an inequitable, unreasonable and unfair result.

We grant the petition for review, reverse the final order of the Department of Revenue and remand this case to the Department with instructions to utilize Section 214.73 in recomputing SM & B's 1972 Florida Corporation Income Tax so that a formula is used which will equitably apportion SM & B's income to the State of Florida.

McCORD, C. J., and ERVIN, J., concur.

DEPARTMENT OF REVENUE of the State of Florida, Petitioner,

v.

STAN MUSIAL & BIGGIES, INC., Respondent.

No. 55711.

Supreme Court of Florida.

July 25, 1980.

Certiorari to the District Court of Appeal, First District.

Jim Smith, Atty. Gen., and E. Wilson Crump, II, Asst. Atty. Gen., Tallahassee, for petitioner.

Julius F. Parker, Jr. of Madigan, Parker, Gatlin, Swedmark & Skelding, Tallahassee, and Anthony J. Sestric of Fordyce & Mayne St. Louis, Mo., for respondent.

ADKINS, Justice.

This cause is before us on petition for writ of certiorari to the First District Court of Appeal on the ground that its decision in *Stan Musial & Biggies, Inc. v. Department of Revenue,* 363 So.2d 375 (Fla. 1st DCA 1978) conflicts with *Roger Dean Enterprises, Inc. v. The Department of Revenue of the State of Florida,* 371 So.2d 101 (Fla. 4th DCA 1978). We have jurisdiction. Art. V, § 3(b)(3), Fla.Const. (1972).

This Court has recently rendered a decision in *Roger Dean. Roger Dean Enterprises, Inc. v. State of Florida, Department of Revenue,* 387 So.2d 358 no. 55,971 (Fla. July 24, 1980). We therefore remand the case *sub judice* to the district court for reconsideration in light of that opinion.

It is so ordered.

SUNDBURG, C. J., and BOYD, OVERTON and ALDERMAN, JJ., concur.

ROGER DEAN ENTERPRISES, INC., Petitioner,

v.

STATE of Florida, DEPARTMENT OF REVENUE, Respondent.

No. 55971.

Supreme Court of Florida.

July 24, 1980.

A foreign corporation petitioned for writ of certiorari to review an order of the Division of Administrative Hearings which upheld assessment of delinquent corporate income taxes against foreign corporation. The Fourth District Court of Appeal, Downey, C. J., denied certiorari, 371 So.2d 101. On certiorari to District Court of Appeal, the Supreme Court, Adkins, J., held that: (1) gain from out-of-state sale of stock held by a foreign corporation doing business in the State is taxable under the state corporate income tax code, and (2) it is constitutional for the state corporate income tax to be imposed on a gain from property sold prior to amendment of the State Constitution permitting such tax when such gain is reported on installment basis in tax year subsequent to passage of the amendment.

Decision of District Court of Appeal approved, and writ discharged.

Overton, J., filed statement concurring in part and dissenting in part.

See also Fla., 387 So.2d 365.

1. Taxation (Key) 1074

"Allocation" is process whereby certain types of income, often called "non-business" income, generally in nature of passive or investment income, are assigned in

entirety to particular jurisdiction for tax purposes, usually state of commercial domicile, theoretically, to exclusion of all other jurisdictions. West's F.S.A. § 220.01 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Taxation (Key) 1005

In case of "apportionment," as opposed to "allocation," taxpayer's normal or business income is mathematically divided among various jurisdictions in which it does business, to determine measure of local tax. West's F.S.A. § 220.01 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

3. Taxation (Key) 1005, 1074

Legislature has rejected entirely the concept of allocation in favor of "full apportionment," i. e., including all income of taxpayer in tax base subject to apportionment regardless of sources from which that income was derived. West's F.S.A. § 220.01 et seq.

4. Commerce (Key) 62.80

Fairly apportioned state tax may be imposed upon income of business operating in interstate commerce. West's F.S.A. § 220.01 et seq.

5. Constitutional Law (Key) 285.2

Taxation (Key) 935

Taxation of income from out-of-state transaction by foreign-chartered corporation does not amount to taking of property without due process in violation of Federal Constitution, there being requisite nexus supplied when

corporation and some of its income-producing activities are connected with taxing jurisdiction; where there is such connection, all corporation's income may be included in fairly apportioned tax base for state income tax purposes, and there is no requirement that each increment of income have relationship to taxing jurisdiction. West's F.S.A. § 220.01 et seq.; U.S.C.A.Const. Amend. 14.

6. Taxation (Key) 1076

Regulation providing that where activities carried on by foreign corporation within state are separate from activities outside state the income subject to tax may be determined upon separate accounting of instate business is directed primarily to determining whether multistate taxpayer operates "unitary" business entirely subject to tax in the state, or separate businesses in several states including Florida, as to which Florida may tax only Florida business. West's F.S.A. §§ 214.73, 220.01 et seq.

7. Taxation (Key) 1005

Under Uniform Division of Income for Tax Purposes Act, there is very strong presumption in favor of a normal three-factor apportionment and against applicability of relief provisions, latter to be used where statute reaches arbitrary or unreasonable results so that its application could be attacked successfully on constitutional grounds, and departures from basic formula should be avoided except where reasonableness requires. West's F.S.A. §§ 214.73, 220.01 et seq.; U.S.C.A.Const. Amend. 14.

8. Taxation (Key) 1005

Relief provisions applicable to apportionment should not be used to remove out-of-state stock made by foreign-chartered corporation subject to its income tax from tax

base. West's F.S.A. §§ 214.73, 220.01 et seq.; U.S.C.A.Const. Amend. 14.

9. Taxation (Key) 1005

Statute gives Department of Revenue discretion to alter apportionment formula in very rare instances but does not vest any discretion in Department to modify federal taxable income. West's F.S.A. §§ 214.73, 220.01 et seq.; 26 U.S.C.A. (I.R.C.1954) §§ 453, 1563.

10. Taxation (Key) 955

It is not unconstitutional for state corporate income tax to be imposed on gain from property sold prior to amendment of State Constitution permitting such tax when said gain is reported on installment basis in tax years subsequent to passage of amendment. West's F.S.A. §§ 220.13 (1)(c), 220.14(1, 4); 26 U.S.C.A. (I.R.C.1954) §§ 1563, 1563(a)(2)(A).

David S. Meisel of Rogers & Meisel, Palm Beach, for petitioner.

Jim Smith, Atty. Gen., and E. Wilson Crump, II, Asst. Atty. Gen., Tallahassee, for respondent.

ADKINS, Justice.

By petition for writ of certiorari we are asked to review a decision of the Fourth District Court of Appeal (*Roger Dean Enterprises v. The Department of Revenue of the State of Florida*, 371 So.2d 101 (Fla.4th DCA 1978)), which involved questions of great public interest. The district court of appeal has certified to us the following two questions:

1. Is the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida taxable under the Florida corporate income tax code?

2. Is it constitutional for the Florida corporate income tax to be imposed on a gain from properties sold prior to the amendment of the Florida constitution permitting such tax when said gain is reported on the installment basis in tax years subsequent to the passage of the amendment?

We answer both questions in the affirmative.

The petitioner, Roger Dean Enterprises, Inc., is referred to hereinafter as the taxpayer and the Department of Revenue of the State of Florida is referred to hereinafter as the department.

The taxpayer, a West Virginia corporation, operated an automobile dealership in Huntington, West Virginia, until June 1, 1962, when it exchanged the assets of its automobile dealership for fifty percent of the capital stock of Dutch Miller Chevrolet, Inc., a West Virginia corporation organized to succeed to the automobile dealership formerly operated by the taxpayer. Prior to this, in 1961, the taxpayer had acquired 100 percent of the capital stock in Palm Beach Motors (the name of which was changed on August 10, 1961, to Roger Dean Chevrolet, Inc.). Roger Dean Chevrolet, Inc., is a wholly-owned subsidiary of the taxpayer which operates on property owned by the taxpayer.

The years involved herein are the fiscal years of the taxpayer ending December 31, 1972, and 1973, during which years the taxpayer's principal income (except for the gain involved herein), consisted of rents received from Roger Dean Chevrolet, Inc. Taxpayer and its subsidiary filed consolidated returns for the years involved herein. During the fiscal year ending December 31, 1972, taxpayer sold its

stock in Dutch Miller Chevrolet, Inc., to an unrelated third party for a gain determined by the department to be in the amount of $349,217.00, which, although the sale took place out of the state of Florida, the department has determined to be taxable under the Florida Income Tax Code (chapter 220, Florida Statutes).

In the fiscal years ending December 31, 1972, and 1973, taxpayer included in Florida taxable income the amounts of $76.00 and $6,245.00, respectively, for the sale of property on April 23, 1971, such gain being reported for federal income tax purposes on the installment method under section 453 of the Internal Revenue Code of 1954.

Roger H. Dean, indvidually, or by attribution during the years involved herein, was the owner of 100 percent of the stock of taxpayer and 75 percent of the stock of Florida Chrysler Plymouth, Inc. The remaining 25 percent of Florida Chrysler Plymouth, Inc., was owned by another person. The department disallowed the $5,000 exemption to the taxpayer in computing its Florida corporate income tax for each of the years in question on the theory that the two corporations were members of a controlled group of corporations, as defined in section 1563 of the Internal Revenue Code of 1954.

By letter of April 13, 1976, the department advised the taxpayer of its proposed deficiencies for the fiscal years ending December 31, 1972, and 1973, in the net respective amounts of $19,086.25 and $1,086.79. Taxpayer duly filed its protest in response thereto and the department rejected taxpayer's position. Taxpayer timely requested an administrative hearing, which was held. The hearing officer issued a recommended order upholding the assessments of tax. The recommended order was submitted to the department and was approved.

The returns of the taxpayer indicated that the taxpayer had no property, payroll, or sales of tangible personal property, or realty ascribable to any jurisdiction other than the state of Florida. Apparently based on these facts, the hearing officer computed in his recommended order that the taxpayer was commercially domiciled in Florida during the tax years in question.

By petition for writ of certiorari the taxpayer sought review of the final agency action, but was denied all relief. These proceedings resulted.

[1, 2] There is a difference between two concepts which are applied in many states that have corporate income taxes. These concepts are "allocation" and "apportionment." Allocation is a process whereby certain types of income, often called "non-business" income, generally in the nature of passive or investment income, are assigned in their entirety to a particular jurisdiction for tax purposes, usually the state of commercial domicile, theoretically, to the exclusion of all other jurisdictions. In the second concept, apportionment, the taxpayer's normal or business income is mathematically divided among the various jurisdictions in which it does business to determine the measure of local tax. Apportionment is generally accomplished by means of a three-factor formula, utilizing property, payroll, and sales in the taxing jurisdiction over property, payroll, and sales in all jurisdictions. Although some case law and other authorities have erroneously used the term allocation when actually referring to apportionment, technically the two are entirely separate, distinct, and different concepts. Of course, the taxpayer concedes that the apportionment concept is applied in Florida.

[3] The legislature has rejected entirely the concept of allocation in favor of "full apportionment," that is, including all income of the taxpayer in the tax base subject

to apportionment regardless of the sources from which that income was derived. Shortly after the adoption of the code this was explained as follows:

> First, the legislature considered whether Florida should differ from the majority of states which tax corporate income by requiring for Florida a full apportionment of the taxable income reported for federal income tax purposes. This treatment of multistate taxpayers differs from the more traditional process of "allocating" i. e. assigning in full—to one jurisdiction some types of passive income, and "apportioning" i. e. assigning proportional shares of income among all the states having jurisdiction over the taxpayer only the balance. . . . Recognizing that Florida is not the "commercial domicile" for a significant number of multistate enterprises, and being aware that the allocation—apportionment format is financially advantageous only to the few commercial domicile states, the Florida Legislature elected to follow the more modern trend to full apportionment.

England, *Corporate Income Taxation in Florida: Background, Scope, and Analysis* in Florida Corporate Income Taxation, 4, 14 (Fla.St.Univ.L.Rev., April 1972).

[4] It is well settled that a fairly apportioned state tax may be imposed upon the income of a business operating in interstate commerce. In *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (U.S. March 19, 1980), Mobil Oil Corporation was organized under the laws of New York, where it had its principal place of business and its "commercial domicile." It did business in many states, including Vermont, where it engaged in the wholesale and retail marketing of petroleum products. Vermont imposed

a corporate income tax, calculated by means of an apportionment formula upon "foreign source" dividend income received by the corporation from its subsidiaries and affiliates doing business abroad. Mobil challenged the tax on the grounds, *inter alia*, that it violated the due process clause of the Fourteenth Amendment and commerce clause. In upholding the tax the Court said:

> It long has been established that the income of a business operating in interstate commerce is not immune from fairly apportioned state taxation. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458-462, [79 S.Ct. 357, 362-364, 3 L.Ed.2d 421] (1959); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120, [41 S.Ct. 45, 46, 65 L.Ed. 165] (1920); *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 328-329, [38 S.Ct. 499, 501, 62 L.Ed. 1135] (1918). "[T]he entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S., at 460 [79 S.Ct., at 363]. For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a "minimal connection" between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-273, [98 S.Ct. 2340, 2344, 57 L.Ed.2d 197] (1978); see *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756, [87 S.Ct. 1389, 1391, 18 L.Ed.2d 505] (1967); *Norfolk & Western R. Co. v. [Missouri] State Tax Comm'n*, 390 U.S. 317, 325, [88 S.Ct.

> 995, 1000, 19 L.Ed.2d 1201] (1968). The requisite "nexus" is supplied if the corporation avails itself of the "substantial privilege of carrying on business" within the State; and "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444-445, [61 S.Ct. 246, 250, 85 L.Ed. 1143] (1940).

100 S.Ct. at 1231.

[5] The taxpayer *sub judice* argues that to tax income from an out-of-state transaction by a foreign-chartered corporation amounts to a taking of its property without due process of law in violation of the Federal Constitution, because there is no nexus between the transaction and the state of Florida. The requisite nexus is supplied when the corporation and some of its income producing activities are connected with the taxing jurisdiction. If this is the case, all of that corporation's income may be included in a fairly apportioned tax base for state income tax purposes. There is no requirement that each increment of income have a relationship to the taxing jurisdiction. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978); *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959). Under the concept of nexus currently employed by the United States Supreme Court, the taxpayer's rental income from Florida property provides sufficient nexus to allow apportioned taxation of all its federal net income.

[6] In the case *sub judice* it appears that all of the taxpayer's payroll is within the state of Florida. Also, all its real and tangible personal property is located in Florida. The trier of fact deduced that the commercial domicile of

the taxpayer was also in Florida. The taxpayer does not argue that Florida utilizes the concept of "allocation" nor does the taxpayer urge any issues relating to the "commercial domicile." Primarily the taxpayer argues that the Florida formulary method of apportionment was unconstitutionally applied in the context of the facts presented and further that the taxpayer was entitled to the benefit of the relief provisions of section 214.73, Florida Statutes (1973). This section reads as follows:

> Apportionment; other methods.—If the apportionment methods of §§214.71 and 214.72 do not fairly represent the extent of a taxpayer's tax base attributable to this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's tax base, if reasonable:
>
> (1) Separate accounting;
>
> (2) The exclusion of any one or more factors;
>
> (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's tax base attributable to this state; or
>
> (4) *The employment of any other method which will produce an equitable apportionment.* (Emphasis supplied.)

The taxpayer also relies upon a regulation of the department which states that where the activities carried on within the state are separate from the activities outside the state, the income subject to tax may be determined upon a separate accounting of the Florida business. Fla. Admin. Code Rule 12 C-1.15. These regulations are directed primarily at determining whether a multistate taxpayer operates a "unitary" business entirely subject to tax in Florida, or separate businesses in several states includ-

ing Florida, as to which Florida may tax only the Florida business.

[7, 8] The relief provision quoted above tracks the language appearing in section 18 of the Uniform Division of Income for Tax Purposes Act (UDITPA). The Act deals with the allocation and apportionment of income of multistate businesses for tax purposes. There is a very strong presumption in favor of normal three-factor apportionment and against the applicability of the relief provisions. See *Donald M. Drake Co. v. Department of Revenue,* 263 Or. 26, 500 P.2d 1041 (1972). The relief provision should be used where the statute reaches arbitrary or unreasonable results so that its application could be attacked successfully on constitutional grounds. Departures from the basic formula should be avoided except where reasonableness requires. *Deseret Pharmaceutical Co., Inc. v. State Tax Commissioner,* 579 P.2d 1322 (Utah 1978); *see* Pierce, *The Uniform Division of Income for State Tax Purposes,* 35 Taxes 747, 782 (1957). The relief provisions applicable to apportionment should not be used to remove an out-of-state stock sale made by a foreign-chartered corporation subject to its income tax from the tax base. *See F. W. Woolworth v. Commissioner of Taxes,* 133 Vt. 93, 328 A.2d 402 (1974); *Hoosier Engineering Co. v. Shea,* 124 Vt. 341, 205 A.2d 821 (1964).

[9] Section 214.73, Florida Statutes (1973), gives the Department of Revenue discretion to alter the apportionment formula in very rare instances, but does not vest any discretion in the department to modify federal taxable income. *Cf. GTE Automatic Electric, Inc. v. Allphin,* 68 Ill. 2d 326, 12 Ill.Dec. 134, 369 N.E.2d 841 (Ill.1977) (relief provision should not be interpreted to allow administrator to use it as a vehicle for tampering with the terms of specific apportionment provisions). *See also* Hellerstein, *Con-*

struing the Uniform Division of Income for Tax Purposes Act: Reflections on the Illinois Supreme Court's Reading of the "Throwback Rule", 45 U.Chi.L.Rev. 768, 790-91 (1978).

The second question certified to us reads as follows:

> Is it constitutional for the Florida corporate income tax to be imposed on a gain from property sold prior to the amendment of the Florida constitution permitting such tax when said gain is reported on the installment basis in tax years subsequent to the passage of the amendment?

371 So.2d at 106.

We approve the following quote from the opinion of the district court of appeal:

> Next, it is argued that, since the sale of property referred to in Petitioner's Point II pre-dated the amendment to the Florida Constitution authorizing corporate income tax, it should not be subject to such tax even though certain installment payments of the sales price were paid during a tax year to which the corporate income tax was applicable. The Legislature specifically provided that the taxpayer has the option to report a gain on the installment basis just as he could do for Federal income tax purposes. It was not Legislative oversight that this method of reporting would cause installments paid after January 1, 1972, on sales which took place prior to January 1, 1972, to be taxed under the new Corporate Income Tax Code. Sensing the inequities involved in such taxation, the Legislature provided that the tax on older transactions would be imposed at a reduced percentage.
>
> We conclude that the Legislature intended the new Corporate Income Tax to apply to installment

payments received by the taxpayer after January 1, 1972, but produced as a result of a transaction prior to January 1, 1972; otherwise, the Legislature would not have enacted Section 220.13(1)(c). We do not believe the explanation of legislative intent contained in Section 220.02(4) conflicts with Section 220.13(1)(c), but if it does, the latter section being located later in the statutory scheme and being more specific, would control.

Petitioner contends it is unconstitutional to tax said installments under the circumstances of this case. This is certainly an arguable position; however, we have considered the authorities cited by petitioner and find them inapposite. On the contrary, we believe the option afforded petitioner of reporting under the accrual method of accounting or reporting on the installment basis enables the taxation of these installments to pass constitutional muster. (Footnoes omitted).

371 So.2d at 104, as modified at 106.

The manner in which the taxpayer exercised its choice distinguishes this case from *S. R. G. Corporation v. Department of Revenue*, 365 So.2d 687 (Fla.1978), and *Clearwater Federal Savings & Loan Association v. Department of Revenue*, 350 So.2d 1134 (Fla.2d DCA 1977) *aff'd* 366 So.2d 1164 (Fla. 1979). Under the position which the department was advocating in both of those cases, the taxpayers could have had no option by which the income realized prior to November 2, 1971 (the effective date of the Florida corporate income tax law) could have escaped inclusion in the Florida tax base since it was included in federal taxable income under the statutory formula for years ending after January 1, 1972. The taxpayer *sub judice* did have a choice. If it had chosen not to use the installment method for

Florida, the statute would have subjected none of the gain from its 1971 installment sale to taxation. The taxpayer describes this as a harsh alternative since it would require future sales to be taxed completely in the year of realization. However, in the long run, the taxpayer would pay no additional tax to the state by making this choice. Moreover, the Florida rate of five percent is considerably below federal rate, presenting an additional reason why the full accrual approach is, in fact, a reasonable alternative to give a taxpayer who desires to free income from a 1971 installment sale from any taxation at all.

[10] The inclusion of installments in later years from sales made prior to the effective date of the statute cannot be successfully challenged on due process grounds. Although not pressed by the taxpayer, this issue may be implicit in the certification of the district court of appeal since no specific constitutonal provsion was mentoned. Other states have been almost unanimous in holding there is no unconstitutional denial of due process. *Welch v. Henry,* 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938); *Estate of Kennett v. State,* 115 N.H. 50, 333 A.2d 452 (1975); *Tiedemann v. Johnson,* 316 A.2d 359 (Me.1974); *Altsuler v. Peters,* 206 N.W.2d 570 (Neb.1973); *Kapzenberg v. Comptroller of the Treasury,* 282 A.2d 465 (Md.1971). The taxpayer finds some relief in *Thorpe v. Mahin,* 43 Ill.2d 36, 250 N.E.2d 633 (1969). This case seemed to turn on an ambiguity in the statute necessitating a construction in favor of the taxpayer. Nevertheless, we do not follow its line of reasoning.

The result reached by applying section 220.13(1)(c), Florida Statutes (1973), to the taxpayer's 1972 and 1973 installment receipts from its 1971 sale in no way infringes upon the federal due process of law requirement.

Under the provisions of section 220.14(1), Florida Statutes (1973), corporate taxpayers are generally allowed an

exemption of $5,000 of net income in computing their tax liability. However, under subsection (4) of section 220.14, only one exemption is allowed to the Florida member of a "controlled group of corporations" filing separate returns. The term "controlled group of corporations" under that section is as defined in section 1563 of the Internal Revenue Code of 1954:

> (a) CONTROLLED GROUP OF CORPORATIONS.—For purposes of this part, the term "controlled group of corporations" means any group of—
>
> * * * * *
>
> (2) BROTHER-SISTER CONTROLLED GROUP.—Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing—
>
> (A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and
>
> (B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

Roger H. Dean, individually, or by attribution during the year, was the owner of 100 percent of the stock of Roger Dean Enterprises, Inc., and 75 percent of Florida Chrysler Plymouth, Inc. The remaining 25 percent of Florida Chrysler Plymouth, Inc., was owned by Robert S. Cuillo, an unrelated person. The question involved here is whether Roger Dean Enterprises, Inc., and Florida

Chrysler Plymouth, Inc., were members of a controlled group of corporations. Roger H. Dean and Robert S. Cuillo are fewer than five persons who own at least 80 percent of the total value of shares of all classes of the stock of each corporation. Section 1563(a)(2)(A), Internal Revenue Code (1954); *Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner of Internal Revenue*, 548 F.2d 501 (4th Cir.1977); *T. L. Hunt, Inc. v. Commissioner*, 562 F.2d 532 (8th Cir.1977).

We adopt the reasoning of these decisions in construing the Florida corporate income tax provisions.

In summary, we hold as follows:

Answering the first question in the affirmative, we hold that the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida may be taxable under the Florida corporate income tax code.

Answering the second question in the affirmative, we hold that it is constitutional for the Florida corporate income tax to be imposed on a gain from property sold prior to the amendment of the Florida Constitution permitting such tax when said gain is reported on the installment basis in tax years subsequent to the passage of the amendment.

We approve the decision of the district court of appeal and, having answered the questions certified to us, we discharge the writ of certiorari.

It is so ordered.

SUNDBERG, C. J., and BOYD, ENGLAND and ALDERMAN, JJ., concur.

OVERTON, J., concurs with the opinion with regard to the first question, but dissents to the second question and would apply *S. R. G. Corp. v. Dept. of Revenue*, 365 So.2d 687 (Fla.1978).

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF
FLORIDA
CASE NO. II-391

STAN MUSIAL & BIGGIE'S, INC.,
Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Respondent.

Opinion filed August 28, 1981.

A Petition for Review of an Order of the State of Florida Department of Revenue.

Julius F. Parker, Jr., and Susan Potter Whisenand of Madigan, Parker, Gatlin, Swedmark & Skelding for Petitioner.

Robert L. Shevin, Attorney General; Patricia S. Turner, Assistant Attorney General; John D. Moriarty, for Respondent.

UPON REMAND FOR RECONSIDERATION

PER CURIAM.

Pursuant to the Supreme Court's opinion in Department of Revenue of the State of Florida v. Stan Musial & Biggie's, Inc., 387 So.2d 365 (Fla. 1980), this Court has reconsidered its opinion in Stan Musial & Biggie's, Inc. v. State Department of Revenue, 363 So.2d 375 (Fla. 1st DCA 1980), and upon reconsideration reverses its prior decision and adopts the opinions of the Supreme Court in Roger Dean Enterprises, Inc. v. State, etc., 387 So.2d 358 (Fla. 1980), and Department of Revenue v. Brunner Enterprises, Inc., 390 So.2d 713 (Fla. 1980). Accordingly, the final order of the Department of Revenue is AFFIRMED.

MILLS, McCORD, and ERVIN, JJ., CONCUR.

tb

FLORIDA DEPARTMENT OF REVENUE - CORPORATION INCOME TAX

STATEMENT OF TAX DUE

Control # 71448

Postmark ____ _____

DATE 10-9-81 VALIDATION NO. n/a F.E.I.N. 43 0641577 F.Y.E. 12-31-72

Assessment	Amount Paid	Balance Due
25,712.80 13,138.72		38,851.52

Please remit promptly to avoid further penalties.

- ☐ MATH ERROR ON LINE ____ SCHEDULE ____
- ☐ LATE FILING ASSESSED PER 214.40 (2), F.S.
- ☒ AUDIT ASSESSMENT ☐ UNDERPAYMENT OF ESTIMATED TAX
- ☐ UNABLE TO LOCATE TOTAL CREDITS CLAIMED
- ☒ RECEIVED WITHOUT FULL REMITTANCE ☐ PENALTY
- ☐ OTHER ____ ☒ INTEREST

The balance shown on this statement is due and payable immediately. You have received this billing for the reasons indicated above.

STAN MUSIAL & BIGGIES INC
5130 OAKLAND AVE
ST LOUSI MISSOURI 63110

A-713 8/81

ORIGINAL

Make Checks Payable To and Mail To:
FLORIDA DEPARTMENT OF REVENUE
CARLTON BUILDING
TALLAHASSEE, FLORIDA 32301

A41

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
CASE NO. II-391

STAN MUSIAL & BIGGIES, INC.,
Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

NOTICE OF APPEAL

Notice is hereby given that Stan Musial & Biggies, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final appellate decision of the District Court of Appeal, First District, State of Florida, entered in this action on August 28, 1981.

This appeal is taken pursuant to 28 USC, Section 1257, the Appellant herein having challenged the constitutionality of the Florida Corporate Income Tax Code, Chapter 220, Florida Statutes, and the Apportionment Formulas applicable to that Code, Part IV of Chapter 214, Florida Statutes, 1971, and the State Courts of Florida having upheld the validity of those Statutes under the Constitution of the United States.

The Clerk will please prepare a Transcript of the Record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said Transcript the entire record now in the possession of the District Court of Appeal, First District, State of Florida.

The following question is presented by this appeal:

Whether the State of Florida in its Corporate Income tax Code may constitutionally tax a foreign corporation, not a unitary business, on capital gains realized by said Corporation from the sale of assets having no nexus to the State of Florida and no connection with any activities or income of the Taxpayer Corporation in the State of Florida, in violation of the constitutional guarantees of due process and equal protection of the laws and the Commerce Clause of the United States Constitution.

Dated this 17th day of November, 1981.

Respectfully submitted,

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Madigan, Parker, Gatlin, Swedmark
& Skelding
P. O. Box 669 - 318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Appellant
Stan Musial & Biggies, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to:

Honorable Jim Smith
Attorney General of the State of Florida
Capitol Building
Tallahassee, Florida 32302

Honorable Patricia S. Turner
Assistant Attorney General of the State of Florida
Capitol Building
Tallahassee, Florida 32302

by mail, this 17th day of November, 1981.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Madigan, Parker, Gatlin, Swedmark
& Skelding
P. O. Box 669 - 318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Appellant
Stan Musial & Biggies, Inc.

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

NO. 81-1041

STAN MUSIAL & BIGGIES, INC.,
Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

JIM SMITH
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
CHIEF TRIAL COUNSEL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA
(904) 488-1573

ATTORNEYS FOR APPELLEE

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

NO. 81-1041

STAN MUSIAL & BIGGIES, INC.,
Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the District Court of Appeal, First District of Florida, on the following grounds:

(1) The present appeal does not lie within the jurisdiction of this Court because the Court which rendered the decision sought to be appealed herein was not the highest Court of the State of Florida in which a decision could be had, and,

(2) The Federal question sought to be presented was not expressly passed upon it any level of the proceedings herein, and

(3) It is manifest that the decision below is so insubstantial as not to need further argument.

STATEMENT OF THE CASE

A. STATE STATUTORY PROVISIONS INVOLVED AND THE NATURE OF THE CASE.

Florida, like many other states, imposes a corporate income tax. The tax is imposed in Ch. 220, Fla. Stat. Various procedural matters involved in the application of the Florida corporate income tax are found in Ch. 214, Fla. Stat. See §§220.53 and 214.01, Fla. Stat. The corporate income tax is imposed as 5% of adjusted federal income. The tax is a privilege tax (§220.02(2), Fla. Stat.), which is imposed "for the privilege of conducting business, earning or receiving income in

state, or being a resident or citizen of this state." §220.11(1), Fla. Stat.; see also §220.02, Fla. Stat.

Where a corporation does business in Florida and other jurisdictions, not all of its adjusted federal income is subject to taxation by the state. Section 214.71, Fla. Stat., provides for apportionment of the income of such a corporation. The ratio to be applied to adjusted federal income in order to determine Florida's share of the tax base is computed under this statute by dividing the taxpayer's property, payroll and sales of tangible personal property in Florida by its property, payroll and sales everywhere. However, a slightly later statute gave the sales factor double weight in computing the ratio. §220.15(4), Fla. Stat. Section 220.72, Fla. Stat., provides certain alternative methods of apportionment

available to various special industries not at issue in the present case. In addition to the foregoing, §214.73, Fla. Stat., provides the Department of Revenue with the discretion to use certain alternatives to the provisions in §§214.71 and 214.72, supra.,"upon a finding that the methods provided in those statutes do not fairly represent the extent of a taxpayer's tax base attributable to this state." The provisions of §§214.71 and 214.73, supra, are portions of the Uniform Division of Income for Tax Purposes Act in effect in many states. See Roger Dean Enterprises, Inc. v. State, 387 So.2d 358, 363 (Fla. 1980).

Stan Musial & Biggie's, Inc. is a foreign (non-Florida) corporation. In 1972, and for other periods of time set out below, it did business in the State of Florida. For federal income tax purposes

and Florida corporate income tax purposes, the taxpayer was on a calendar reporting year.

In 1972, the taxpayer corporation owned, managed and operated restaurants in St. Louis, Missouri, Clearwater, Florida, and Bal Harbour, Florida, all under the name "Stan Musial & Biggie's." The restaurants are each advertised as being one of several "Stan Musial & Biggie's" Restaurants. The restaurants in Florida were located respectively in the Clearwater Beach Hilton Hotel and the Ivanhoe Hotel which were also managed by the taxpayer and owned by it (100% in each case by the close of the tax year, through acquisitions and merger during the tax year.)

On its 1972 federal income tax return, the taxpayer included, in addition the gains and losses from its restaurant and hotel

operations $941,418 as gain realized from the sale of certain securities in November of 1972. Eighty-five percent of the securities that were sold in November of 1972 were either purchased, or received as stock dividends from securities which were purchased, prior to August 1, 1964, and hence prior to the time the taxpayer acquired its first interest in any Florida business. All stock purchases were made with money earned from the restaurant in St. Louis, Missouri. The securities remained in Missouri at all time and all dividends were received in Missouri. The sale of the securities generating the gain took place in Missouri. The sale predated slightly the acquisition by the taxpayer of its interest in the Clearwater Beach Hilton, although it did have an interest in the partnership which owned the Ivanhoe Hotel and Restaurant at the time of the securities sale.

During the tax year in question, the Clearwater and Ivanhoe Hotel and Restaurant business in Florida and the Appellant's restaurant business in Missouri had separate, individual general managers. The staff and on-site supervisory personnel of the Florida operations were under the direction and control of one of the taxpayer corporation's vice-presidents, one Richard Musial. The Missouri staff and on-site supervisory personnel were under the direction of another vice-president, one Jack Garagrani. Stanley F. Musial, President and Chairman of the Board of the corporation, determined and carried out overall policy, and reviewed the actions of these two vice-presidents on matters of policy. The Florida businesses furnished information and reports concerning business activities to the corporation's main office on a semi-weekly basis.

As to the Florida hotel operations, there was no central purchasing, advertising or reservation service. The hotels had no standardized product line.

The taxpayer filed a timely Florida Corporate Income Tax Return for its 1972 tax year on which it sought to exclude the gains from its 1972 stock sale from adjusted federal income (see §220.15, Fla. Stat.), the Florida tax base. Upon examination of the return, the Department proposed a tax deficiency of $29,392.00, adding these gains back to the tax base. Following a protest and informal conference with the taxpayer, this proposed deficiency was reduced to $25,712.80 by the Department.

The taxpayer seasonably exhausted all administrative remedies prior to seeking review by the First District Court of Appeal.

Stan Musial & Biggies alleges that it not a unitary business operation. The

Department of Revenue does not concur in this allegation based on the foregoing facts, and as will be shown below, any finding to this effect which may have been made at an earlier stage of the proceeding is not presently in effect.

B. PROCEEDINGS BELOW

This proceeding began when the taxpayer filed a petition with the Florida Department of Revenue objecting to a proposed corporate income tax deficiency by the Department resulting from the inclusion in the tax base for the 1972 tax year of certain capital gains derived from the disposition of securities during that year which the taxpayer had excluded on its original state income tax return. The Department of Revenue assigned the petition to the Florida Division of Administrative Hearings for purposes of conducting the requested administrative

hearing, under the provisions of the Florida Administrative Procedures Act. (Ch. 120, Fla. Stat.) A hearing was held in due course. The Hearing Officer submitted a recommended order recommending that the taxpayer be given the relief it sought under the provisions of §214.73, Fla. Stat. Thereafter, notwithstanding this recommendation, the Governor and Cabinet of the State of Florida, sitting as head of the Department of Revenue, took final agency action upholding the proposed deficiency. The final administrative order as thus adopted noted the Department of Revenue's position that the corporation was engaged in a unitary business operation in Florida and elsewhere during the tax year at issue.

The taxpayer sought review of this administrative decision in the District Court of Appeal, First District of Florida, pursuant to §120.68, Fla. Stat. The First

District reversed the order of the Department of Revenue, and held that the taxpayer was entitled to the relief it sought under the provisions of §214.73, Fla. Stat. See Stan Musial & Biggies, Inc. v. Department of Revenue, 363 So.2d 375 (Fla. 1st DCA 1978). The Court also noted that it viewed Stan Musial & Biggies as a non-unitary business during the tax year at issue.

The Department of Revenue sought review of this decision by the Florida Supreme Court, alleging jurisdiction to exist under Article V, Sec. 3(b)(3), Florida Constitution, which gave the State Supreme Court jurisdiction to review decisions which conflict with those of another District Court of Appeal. The Department contended that the First District's decision conflicted with that of Roger Dean Enterprises, Inc. v. Department of Revenue, 371 So.2d 101

(Fla. 4th DCA 1978), on the question of whether §214.73, Fla. Stat., allowed income derived from an out-of-state securities sale to be excluded from the tax base of a corporation doing multi-state business in Florida and elsewhere. On July 25, 1980, the Florida Supreme Court rendered a decision in which it specifically held that it had jurisdiction, and went on to remand the case to the First District for review in light of its contemporaneous decision in Roger Dean, supra. Mandate was issued by the Florida Supreme Court to the First District on September 8, 1980.

In due course, the First District entered its decision, review of which is herein sought. The First District reversed its earlier decision and affirmed the administrative order which had originally been entered by the Department of Revenue. No rehearing was sought, and no further

review by the Florida Supreme Court was sought by the taxpayer.

ARGUMENT

POINT I

THE DECISION BELOW IS NOT A DECISION RENDERED BY THE HIGHEST COURT OF THE STATE OF FLORIDA IN WHICH A DECISION COULD BE HAD.

Very clearly, the taxpayer has attempted to secure review of a decision of the District Court of Appeal, State of Florida. In the Florida judiciary, the Florida Supreme Court is the highest judicial body in the state. At the outset, it is admitted that the jurisdiction of the Florida Supreme Court is limited, such that not every decision by a District Court of Appeal is subject to review by the Florida Supreme Court.

However, in the present case, as noted above, this case was subjected to review by the Florida Supreme Court at one point. Specifically noted above, is the fact that the Florida Supreme Court held that

"We have jurisdiction." 387 So.2d at 366. The Court thereupon vacated the decision of the First District and remanded the matter back to the First District which, pursuant to this mandate, rendered the decision, review of which is sought herein.

The Department of Revenue submits that under these circumstances, the Florida Supreme Court would have had jurisdiction to review the decision which was entered by the First District on August 28, 1981. Section 25.041(1), Fla. Stat., reads as follows:

> The Supreme Court is vested with all the power and authority necessary for carrying into complete execution all its judgments, decrees and determinations in the matters before it, agreeable to the usage and principles of law.

The Florida Supreme Court has twice held that this statute gives it jurisdiction for purposes of reviewing actions by the District Courts of Appeal and the lower

Courts issued pursuant to mandate from an earlier appeal to determine whether they are consistent with the mandate of the Supreme Court. O.P. Corporation v. Village of North Palm Beach, 302 So.2d 130 (Fla. 1974), and Posner v. Posner, 257 So.2d 530 (Fla. 1972). Thus, if the taxpayer had been of the view that the decision of the First District was inconsistent with the Florida Supreme Court's mandate, it could have brought the case back before the Florida Supreme Court to have this determined. The fact that it chose not to do so makes no difference. Quite clearly, there was a higher Court than the First District "in which a decision could be had." This is enough to defeat the taxpayer's attempt to establish jurisdiction in this Court, under 28 U.S.C., §1257.

It might be that the taxpayer is prepared to concede, however, that the

decision entered by the First District was actually consistent with the mandate from the Florida Supreme Court. This would still not establish proper jurisdiction in this Court. Instead, it would indicate that the taxpayer is really aggrieved by and seeking review of the decision by the Florida Supreme Court, rendered on July 25, 1980, as reported at 387 So.2d 365. If this is the case, the taxpayer clearly cannot now invoke the jurisdiction of this Court. In the first place, its notice of appeal clearly designates the decision of the First District and not the Supreme Court as being the decision from which the appeal is taken. More significantly, this appeal would then be viewed under the provisions of 28 U.S. Code, §2101(c), which provides that such appeals must be initiated within 90 days of the rendition of the decision being appealed.

POINT II

THE DECISION BELOW DID NOT EXPRESSLY PASS UPON THE ISSUE SOUGHT TO BE RAISED BY THE APPELLANT HEREIN.

At the outset, it must be conceded that the taxpayer did argue administratively and before the First District that taxation of the income in question from its stock sale would allegedly violate the due process clause of the Federal Constitution and corresponding provisions in the Florida State Constitution. However, it should be pointed out that none of the tribunals which considered this matter expressly passed upon this issue. At the administrative level, the Department of Revenue and the Division of Administrative Hearings were foreclosed from considering the constitutionality of the statutes in question. The First District did not specifically consider the constitutional issue either, because it construed the statute, §214.73, Fla.

Stat., so as to give the taxpayer the relief which it sought. The Florida Supreme Court's consideration of the case appears to have been limited to a determination that the decision of the First District did indeed conflict with the decision of the Fourth District in Roger Dean. Thus, it did not expressly address the constitutional issue in the present case either, although it did, admittedly, address a similar argument in its own disposition of the Roger Dean case (387 So.2d at 363). On remand, the First District does not appear to have given any express consideration to this issue either, beyond adopting the Florida Supreme Court's Roger Dean decision as the rationale for affirming the order of the Department of Revenue (which, as noted above, did not speak to the issue). Thus, although the taxpayer did raise a constitutional issue, it does not appear to have been expressly passed upon at any stage of the proceedings below.

POINT III

THE FEDERAL QUESTION ON WHICH THIS APPEAL DEPENDS IS SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

It is the position of the Department of Revenue that the issue sought to be raised by Stan Musial & Biggies has been sufficiently addressed in a series of recent decisions from this Court so as to require no further argument. It is submitted that those decisions dictate a holding in favor of the Department of Revenue.

The taxpayer argues that to tax income from an out of state transaction by a foreign chartered corporation amounts to a taking of its property without due process of law in violation of the Federal Constitution. It argues that there is no nexus between the transaction and the State of Florida and that income from the transaction therefore cannot be taxed. In propounding this argument, the taxpayer misapplies the concept of nexus as it has developed in regard to

state income taxation of a multistate business entity. What is required is that the corporation and some of its income producing activities be connected with the taxing jurisdiction. If this is the case, all of that corporation's income may be included in a fairly apportioned tax base for state income tax purposes. There is no requirement whatsoever that each increment of income have a relationship to the taxing jurisdiction.

This result is born out by the case of North Western States Portland Cement Co. v. State of Minnesota, 358 U.S. 450, 79 S. Ct. 357 (1959). There, in a wide ranging opinion dealing with various aspects of state income taxation of foreign corporations doing a multistate business partly within the borders of a taxing state, this Court paused to examine its earlier decisions in Bass, Ratcliff & Gretton, Ltd. v. State

Tax Commission, 266 U.S. 271, 45 S.Ct. 82 (1924) and Norfolk & W.R. Co. v. State of North Carolina, 297 U.S. 682, 56 S.Ct. 625 (1936). It concluded:

> These cases stand for the doctrine that the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formula utilizing in-state aspects of interstate affairs. 358 U.S. 460, 79 S.Ct. 363 (e.s.)

A more recent occasion which the Court had to examine the constitutionality of a state's apportioned income taxation of a multistate corporation was in the case of Moorman Mfg. Co. v. Bair, 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978). In Moorman, the taxpayer, an Illinois corporation, complained that application of Iowa's single factor income tax apportionment, based on sales only, resulted in that state unconstitutionally taxing income attributable to its Illinois manufacturing operations. In rejecting the taxpayer's contentions, the

Court stated initially:

> This argument rests on two premises: first, that appellant's Illinois operations were responsible for some of the profits generated by sales in Iowa; and, second, that a formula that reaches any income not in fact earned within the borders of the taxing state violates due process. The first premise is speculative and the second is foreclosed by prior decisions of this court. (e.s.) 98 S.Ct. at 2343-2344

Thus, this second issue, that it is unconstitutional for a state to tax any income not earned within its borders, is the same argument that the taxpayer urges here. In Moorman, the Supreme Court cited favorably to Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165 (1920), Bass, Ratcliff & Gretton v. State Tax Commission, supra, and Ford Motor Company v. Beauchamp, 308 U.S. 331, 60 S.Ct. 273, 84 L.Ed. 640 (1939), as reflecting the proposition that occasional over-reflection or under-reflection of income, inherent in

almost any apportionment formula, will not usually invalidate that formula on constitutional grounds. The Court went on to distinguish the case of Hans Rees' Sons v. North Carolina, 283 U.S. 123, 51 S.Ct. 385, 73 L.Ed. 879 (1930), relied upon by taxpayer herein, narrowly limiting that case to the application of the specific formula involved therein to the particular taxpayer. (See 98 S.Ct. at 2345).

More recently, in the cases of Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 100 S.Ct. 2109, 65 L.Ed.2d 66 (1980); and Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980), the Court upheld the right of a state to include in the tax base subject to apportionment of a unitary business, dividend income from subsidiaries doing business in other states and countries, but not in the taxing state. Of the concept

of nexus, the Court said in Exxon, quoting from Mobile:

> The nexus is established if the corporation "avails itself of the 'substantial privilege of carrying on business' with-the State." 447 U.S. 220, 65 L.Ed.2d 79

Under the concept of nexus currently employed by this Court, the taxpayer's income from its Florida restaurant and hotel operations provides sufficient nexus to allow apportioned taxation of all of its federal net income.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this Court does not have jurisdiction to entertain this matter, and further that the question presented by this appeal is so insubstantial as to warrant no further argument. Appellee respectfully moves the Court to dismiss the appeal, or in the

alternative, to affirm the judgment entered in the case by the District Court of Appeal, First District of Florida.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
Chief Trial Counsel
Department of Legal Affairs
The Capitol
Tallahassee, Florida
(904) 488-1573

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been sent by U.S. Mail this 14th day of January, 1982, to: Julius F. Parker, Jr., Esq., Madigan, Parker, Gatlin, Swedmark & Skelding, P.O. Box 669, Tallahassee, Florida 32302.

JIM SMITH
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
Chief Trial Counsel
Department of Legal Affairs
The Capitol
Tallahassee, Florida
(904) 488-1573

ATTORNEYS FOR APPELLEE